

# **TOWN OF MOUNT AIRY TOWN COUNCIL**

## **FINDINGS AND DECISION**

### **CASE NO. M-REZ-2019-01 APPLICATION FOR REZONING**

**HEARING DATE: FEBRUARY 19, 2020**

**ADOPTED MARCH 2, 2020**

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Applicant:	DMS Development, Inc., and its assigns (hereafter "Applicant")
Owners:	Thomas and Kurt Vosloh (hereafter "Owners" or "the Voslohs")
Property:	1801 South Main Street, Mt. Airy, MD, Tax Map 0602, Grid 0019, Parcel 116 ("the Vosloh Property")
Acreage:	5.2796 acres approximately; 2.5516 acres approximately requested to be rezoned
Current Zoning:	RE Zone (Residential Existing)
Proposed Zoning:	Community Commercial Zone (CC) for 2.5516 acres of the Vosloh Property

**WHEREAS**, application to the Town was made by Applicant, the prospective developer of a portion of the Vosloh Property, for the rezoning of 2.5516 acres of the Vosloh Property from the current zoning of Residential Existing (RE) placed on so much of the Vosloh Property shown on the Town of Mt. Airy Zoning Map ("the Town Zoning Map"), to Community Commercial ("CC"), pursuant to the Land Use Article of the Maryland Code ("LU"), Section 4-204 and the Town Code, Section 112-69 on the basis of a substantial change in the character of the neighborhood and mistake (hereinafter "the Application"); and

**WHEREAS**, the Application was assigned case number M-REZ-2019-01 by the Town;  
and

**WHEREAS**, pursuant to the Town Code, Section 112-67, the matter was referred to the Town's Planning Commission for a recommendation; and

**WHEREAS**, at its regular meeting on September 30, 2019, the Planning Commission recommended that the Application not be approved; and

**WHEREAS**, pursuant to LU, Sections 4-203(b) and 4-204(b)(5), and the Town Code, Section 112-66A, the Town Council conducted a public hearing on the application on February 19, 2020 after the public hearing had been duly advertised in accord with the Maryland and Town Codes; and

**WHEREAS**, the following members of the Town Council were in attendance: Councilman Larry Hushour (President), Councilman Karl Munder, Councilman Jason Poirier, Councilperson Pamela Reed, and Councilperson Patricia Washabaugh; and

**WHEREAS**, also present for the Hearing, among others, were: Town Attorney Thomas V. McCarron, Town Director of Planning and Zoning John Breeding, Town Engineer Barney Quinn, Town Clerk Holly McCleary, Counsel for Applicant David Bowersox, Esquire, and the Flemings, owners of property adjacent to the Vosloh Property referred to below; and

**WHEREAS**, all witnesses were duly sworn; and

**WHEREAS**, the following witnesses testified with opportunity given for cross-examination:

John Breeding, Town Director of Planning and Zoning

Ronald Thompson, P.E. of VanMar Associates, Inc., Engineer and mixed fact/expert witness called on behalf of Applicant

Edmund R. Cueman, APA, Expert in Land Use and Planning called as an expert witness on behalf of Applicant

Kurt Vosloh, who resides at 14187 Day Avenue, Mt. Airy, and is an owner of the Vosloh Property, called by Applicant

Amy Witter, 2009 Ford Vines Court, Mt. Airy, Md.

Wendy Kerney, 3936 Skyview Drive, Mt. Airy, Md.

Jerry Bortgie, 1701 S. Main Street, Mt. Airy, Md.



Beth Walker-Bole, 1514 Rising Ridge, Mt. Airy, Md.

Scott Sirchio, 1607 Pullman Court, Mt. Airy, Md.; and

**WHEREAS**, the following exhibits were introduced by the Town as to Exhibit 1, and the rest by Applicant as follows:

- Exhibit 1 - Staff Report of John Breeding, Town Director of Planning and Zoning, with attachments including Memorandum reporting the recommendation of the Town Planning Commission
- Exhibit 2 - Town Planning Commission file contents and materials concerning the Application
- Exhibit 3 - Boundary Survey of the Vosloh Property prepared by VanMar Associates, Inc. dated 5/10/19
- Exhibit 4 - Deed dated September 29, 1972 recorded among the Land Records of Carroll County, Maryland at Liber 523, Folio 149, *etc.*, conveying certain portions of what once comprised the Vosloh Property, but not including the right of way at issue discussed below
- Exhibit 5 - Plat of the Vosloh Property showing Northwest boundary line of State Right of Way discussed below which is contended to be a mapping error carried over into the Town Zoning Map – shows portions of the Vosloh Property and a portion of what is known as “the Fleming Property”, 1709 S. Main Street, Mt. Airy, Maryland not shown on the Town Zoning Map
- Exhibit 6 - Resume of Edmund R. Cueman, APA
- Exhibit 7 - Portion of Town Zoning Map depicting part of the Vosloh Property
- Exhibit 8 - Supplementary Materials to include enlarged section of Mt. Airy Zoning Map (same as Exhibit 7), VanMar Boundary Survey (same as Exhibit 3), Tilmes/Cueman email and attached “VOIDED” Plat July 26, 2019, SDAT Tax Map (highlighted), Aerial Photo/Tax Map/Boundary Overlays, 2013 Master Plan, Vacant Land Inventory (Application Ex. “E”), 2013 Master Plan Existing Use of Land (Application Ex. “F”), 2013 Master Plan, Regionalism Policies (Application Ex. “G”), Carroll County Priority Funding Areas, South Sector; Mt. Airy Resolution Application MA-R-18-01, Mt. Airy Planning Commission Staff Report Dorsey/MA-R-18-01 for 4040 Twin Arch Road, Excerpts of the Mt. Airy



2013 Comprehensive Plan Chapter Five (pp. 83, 91, 93 and 96); 2013  
Master Plan, Future Annexation Areas, Designated Land Use

**WHEREAS**, in summary, Town Director of Planning and Zoning, **John Breeding**, summarized and introduced his Staff Report, including all attachments, as **Exhibit 1**, and reported on the recommendation of the Town Planning Commission on the Application, which was unfavorable to the Application; and on cross examination by counsel for Applicant that, among other things, the 2019 County map attached to the Staff Report showing the entirety of the Vosloh Property as Residential Existing (RE) zoned within the Town had not yet been formally approved by the County; and

**WHEREAS**, David Bowersox, Esquire, provided an opening statement on behalf of the Applicant arguing in sum that a substantial change in the neighborhood and a mistake justifies a rezoning of at least a part of the Vosloh Property (for which application for rezoning was made), and previewed the evidence summarized herein; and

**WHEREAS**, in summary, **Ronald Thompson** testified that VanMar prepared a boundary survey (**Exhibit 3**) in connection with proposed development of the Vosloh Property and determined that the Vosloh Property was larger than depicted on Town, SHA and State Department of Assessments and Taxation ("SDAT") maps, that several parcels (depicted in a demonstrative not marked as an Exhibit) had been conveyed by the Voslohs to the SHA by deed (**Exhibit 4**), but none of them included an area on said maps depicting an SHA Right of Way along the Eastern side of the Vosloh Property which due to this SHA Right of Way caused depiction of the Vosloh Property as much smaller than it really was leaving a significant portion of the Vosloh Property (3.443 acres more or less) "non-existent" and without any zoning designation; that the original source of this SHA Right of Way appears to have been a State Roads Commission proposed right of way (**Exhibit 5**) which was voided, but picked up in successive mapping of the SHA, SDAT and the Town's Zoning Map; and on cross examination testified that the maps of the SDAT contain a caveat that they should not be relied upon for accurate property boundaries; and

**WHEREAS**, in summary, **Edmund R. Cueman**, testified about his credentials, as outlined in his resume (**Exhibit 6**), which has included serving as the Carroll County Planning Director from 1971-1995 and that he is currently privately consulting in land use matters; Mr. Cueman was offered by Applicant as an expert in land use planning; Mr. Cueman further testified that at the request of Applicant, he examined the Vosloh Property in relation to the neighborhood, the Town's boundaries, and streets, and examined the Town's Zoning Map; he concurred with the conclusions of VanMar that a significant portion of the Vosloh Property was missing from the Town Zoning Map; having done research, he recounted the relevant history of the Vosloh Property dating back to 1965 when the Vosloh family purchased the property; he recounted that the property was part of a large annexation into the Town in 1966 (but before the Town's first Zoning Ordinance likely existed); he testified to the voided State Roads



Commission Right of Way, No. CL-409-4-771 from 1970-71 (hereafter "SHA Right of Way"), which had "gotten into the mix" (meaning it had ultimately been picked up on the Town's Zoning Maps since those maps were taken from SDAT and ultimately SHA mapping, as is the case with most municipal zoning maps); Mr. Cueman testified that the effect of this mapping error was to leave a significant portion of the Vosloh Property "unzoned" which must be corrected; he rendered the opinion that the mapping error was a "mistake in zoning" in that the Town Zoning Map misstated or "hid" a substantial part of the Vosloh Property leaving only a relatively small, undeveloped triangular area in the Northern part of the property shown as the only portion that was zoned at all (in the Residential Existing or "RE" zone); he testified that in his opinion, had the Zoning Map accurately shown the full extent of the Vosloh Property, it would have likely received serious consideration for Community Commercial (CC) zoning, which is the zoning for adjoining properties across the street, and given that the Vosloh Property is a "gateway" to the Town (entering Exhibit 7); Mr. Cueman further testified that in his opinion, RE zoning would be "very inappropriate" for this location if it were not for the Town Zoning Map showing only a small piece of the property; Mr. Cueman also observed that the Vosloh Property is within the Municipal State Priority Funding Area, that water and sewer would be available to the property according to the Town Director of Planning and Zoning's Staff Report (Exhibit 1), that the property abuts the interchange and Rte. 27 and that other streets surrounding or near the property are for the most part considered principal, intermediate arterial roads or major collector roads; he testified that the full extent of the Vosloh Property is much more viable for development as a commercial property than the small triangular area depicted on the Town's Zoning Map is viable for residential development; he testified that as to the claim of a substantial change in the neighborhood, evidence of such was found in the form of a 2018 piecemeal rezoning by the Town of other property located at 4040 Twin Arch Road from the RE to the Industrial (I) Zone on the basis of a substantial change in the character of the neighborhood, and a recent decision by the Town Council to convey a portion of the Town's property to property across the street from the Vosloh Property in support of a Chick-Fil-A development where there currently exists a Pizza Hut; "Supplementary Materials" were introduced through Mr. Cueman (Exhibit 8) in aid of his testimony, which were to some extent duplicative of other materials already introduced as Exhibits, but which included documents related to the aforementioned rezoning of 4040 Twin Arch Road and the Resolution to convey Town property to the Chick-Fil-A property; on cross examination by Ms. Kerney, Mr. Cueman testified over certain objections made on the record that when annexed, and then on redirect that the Vosloh Property was likely farm land, but was annexed before any Town zoning existed; that the 4040 Twin Arch Road property was not necessarily within the same "neighborhood" as the Vosloh Property; that roads are often used in planning as a dividing line between less intensive and more intensive zones; that zoning the Vosloh Property to the CC zone would place a significantly more intensive zone adjacent to the other RE zoned properties on the same side of South Main Street as the Vosloh Property, particularly given the proposed access points for the proposed commercial development; that Ridgeside Drive is a minor collector road; that the Chick-Fil-A will not be a different use than what is presently on that property across the street (currently a Pizza Hut); on cross examination by Council President Hushour, Mr. Cueman indicated that the rear of the



Fleming Property (located at 1709 S. Main Street, Mt. Airy, Maryland) also was partially "hidden" by the aforementioned SHA Right of Way and may require correction of the mapping error; and on cross examination by Councilmember Washabaugh, Mr. Cueman testified as to what he meant by "substantial" change in the neighborhood.

**WHEREAS, Kurt Vosloh** was called by Applicant to testify that the Vosloh family members support rezoning and he confirmed the basic chronology offered by Mr. Cueman in his testimony; and

**WHEREAS, Amy Witter** testified against the rezoning of the Vosloh Property expressing concern about the effect on traffic of too many developments allowed to go forward, and was briefly cross examined by counsel for Applicant as to where the witness resided in relation to the Vosloh Property; and

**WHEREAS, Wendy Kerney** testified that she is an attorney who practices in the area of land use and zoning, though she did not purport to represent any particular "party" in the hearing, that the only reason that a change in zoning is sought here is that a Wa Wa gas station and convenience store is planned for development of the site, and that the developer thought that it would be a good location to develop for this purpose, and not because there truly was a change or mistake; that the line demarcating the CC and RE zones in this area made by the Town was a logical one – S. Main Street, which should not be changed; that the Town should not place the more intensive CC zoning up against the RE zoned residential properties on the same side of S. Main Street as the Vosloh Property, particularly given the proposed access points for the development; that there has been no substantial change in the neighborhood; that she had never heard of "unzoned" property; that the Applicant here is attempting to bootstrap what is a ministerial mapping area into a zoning mistake; that the Chick-Fil-A is the same use as the Pizza Hut and cannot evidence a change in use; that the property that was rezoned in 2018 at 4040 Twin Arch Road is not in the same "neighborhood" as the Vosloh Property; that the area has an abundance of gas stations and convenience stores already; that even if the Town Council finds a mistake in zoning, it may still legislatively decide not to rezone the Vosloh Property anyway; and on cross examination by counsel for Applicant that she lives approximately 4-5 miles outside of Town and co-owns property in the Town that causes her to pass through where the Vosloh Property is located; and

**WHEREAS, Jerry Bortgie** testified that he lives on property adjacent to or otherwise very near the Vosloh Property, and that he is in favor of the rezoning, that the proposed development will not change matters much in the intersection by way of traffic given the proposal for a Chick-Fil-A anyway; and

**WHEREAS, Beth Walker-Bole** testified that Mt. Airy cannot handle more traffic in this area and is against this property being zoned commercial; and



**WHEREAS, Scott Serchio** questioned whether the Town was in the position to even address these issues and/or rezone given that the SDAT has not yet amended its map for the purposes of taxation; and

**WHEREAS**, counsel for Applicant provided closing argument emphasizing points made in Applicant's presentation as to a substantial change in the character of the neighborhood and that a mapping error contained in the Town Zoning Map would justify a rezoning of the Vosloh Property under the law (citing *White v. Spring*, 109 Md. App. 692 (1996)); and argued that, while acknowledging that upon a finding of mistake or change the Town Council may not be compelled to rezone the property, but may legislatively decide whether to rezone the property and if so, to what district, there are good reasons to rezone the property to the CC zone, including that there has been no recent proposed residential development of the Vosloh Property.

**WHEREAS**, the proceedings were video and audio recorded and the exhibits were received into evidence.

**NOW, THEREFORE**, the Town Council, upon completion of the presentation of evidence, voted as follows on the following questions on successive roll call votes after opportunity for discussion on the record as to each question:

1. Has the Applicant established that a **"substantial change"** has occurred in the existing neighborhood since the last master plan and comprehensive rezoning that would form a basis to rezone the Applicant's Property (**meaning the portion of the property** for which rezoning is applied for)?

*Finding: 0 Yes, 4 No (Councilmembers Munder, Washabaugh, Hushour and Poirier), 1 recusal (Councilmember Reed)*

2. Has the Applicant met the burden of establishing that a **"mistake"** occurred in the last master plan and comprehensive rezoning that would form a basis to rezone the Applicant's Property?

*Finding: 4 Yes (Councilmembers Munder, Washabaugh, Hushour and Poirier), 0 No, 1 recusal (Councilmember Reed)*

3. Should the "portion" of the Applicant's Property, as defined in the application, be rezoned from **Residential Existing** to the **Community Commercial** or to some other zone?

*Finding: 1 Yes to the CC Zone (Councilmember Munder), 3 No (Councilmembers Washabaugh, Hushour and Poirier), 1 recusal (Councilmember Reed)*

4. Should the Town Zoning Map be amended to extend the borders of the parcel to the extent of the SHA right of way depicted in the Town's zoning map, and should that part of the property be designated RE zoned?

***Finding: 4 Yes (Councilmembers Munder, Washabaugh, Hushour and Poirier), 0 No, 1 recusal (Councilmember Reed)***

These Findings and Conclusions were APPROVED this 2nd day of March, 2020 by a vote of 4 in favor, 0 opposed and 1 recusal (Councilmember Reed).

ATTEST:

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John Breeding,  
Director of Planning  
and Zoning  
Town of Mt. Airy

\_\_\_\_\_  
Larry Hushour, President  
Town of Mt. Airy Town Council

\_\_\_\_\_  
Jason Poirier, Secretary  
Town of Mt. Airy Town Council

Approved as to legal form and sufficiency this 2nd day of March, 2020.

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Thomas V. McCarron, Town Attorney